

April 7, 2000

TIME WARNER CABLE OF MAINE
Request for Advisory Ruling
Regarding Pilot Program

ADVISORY RULING

WELCH, Chairman; NUGENT and DIAMOND, Commissioners

I. INTRODUCTION

On March 24, 2000, Time Warner Cable (TWC) filed a Request for an Advisory Ruling. The request described proposed telecommunications activities by TWC and sought a ruling that TWC, if it undertook those activities, would not be a telephone utility under Maine law. For the reasons described below, we agree that TWC will not be a public utility if it undertakes the limited activities as described.

Advisory Rulings are governed by 5 M.R.S.A. § 9001 and by Chapter 110, Part 6 (§§ 601-604) of the Commission's Rules. 5 M.R.S.A. § 9001(3) states that an advisory ruling shall not be binding upon an agency; Chapter 110 § 604 states "no advisory ruling shall constitute res judicata or legal precedent with respect to the issues raised before the Commission." Both provisions state: "In any subsequent enforcement actions created by Commission, however, any person's justifiable reliance upon the ruling shall be considered mitigation of any penalties sought to be assessed."

Pursuant to section 603 of Chapter 110, the General Counsel of the Commission has reviewed Time Warner Cable's petition and has recommended to the Commission that it decide to issue an advisory ruling. Section 603 (b) of Chapter 110 states:

Upon the decision of the Commission to issue an advisory opinion and the determination by the General Counsel that a petition contains sufficient information, the Administrative Director shall give notice to the petitioner, to the utility or utilities affected and to other persons whose rights, duties and privileges are directly affected.

In this Order we simultaneously decide to issue an advisory opinion and issue the advisory ruling itself. We did not send direct notice of the request to "affected utilities," although we did send notice of our deliberations to all persons who normally receive those notices. We received comments from the Public Advocate (OPA), Bell Atlantic-Maine (BA-ME), and the Telephone Association of Maine (TAM), and a comment from TWC replying to the comments of BA-ME and the OPA.

TAM requested that the Commission provide “adequate” notice and opportunity to comment. Other commenters did not object to the amount of time available for filing comments. We find that the comments by TAM express its views clearly.

II. FACTS ALLEGED BY TIME WARNER CABLE

In its Request Time Warner Cable states:

TWC provides cable television service to various communities in southern and northern Maine. For the past several years, TWC has also been offering a cable-modem-based Internet service, which is sold in Maine under the brand name “Road Runner™.” Subscribers to Road Runner Service obtain local content, such as weather forecasts and shopping service, plus high-speed access to the Internet. This service is provided by means of TWC’s hybrid fiber coaxial (“HFC”) plant.

TWC has been working to develop, as an additional feature to its existing cable modem service, a non-powered Internet-based two-way voice service using its HFC plant. TWC expects that this feature of TWC’s cable modem service will be offered under the name “Line Runner™.” TWC has decided to offer a pilot program, limited in duration, geographical area, and number of subscribers, to its existing Road Runner subscribers (The “Pilot Program”). This service would not be a substitute for regular telephone service, since it is a non-powered service and therefore will not operate whenever the subscriber loses service from its electric utility. Although TWC intends to charge participants in its Pilot Program a monthly fee for the additional feature being offered, it desires to run the Pilot Program primarily to gain information about consumer demand and preferences for such service and to attempt to determine whether the service can be provided on a profitable basis. TWC also expects to obtain experience that may help it to improve its ability to offer such service, should it elect to do so on a permanent basis at some future time.

TWC will offer participation in the Pilot Program only to its existing base of Road Runner customers, and then only to those located in the greater Portland area. No more than 1,000 customers will be allowed to participate in the program. TWC will be selective in its choice of Pilot Program participants; it will seek to spread out participation so as to enable it to measure usage patterns in a variety of communities.

Pursuant to a data request from the Commission, issued and answered after the filing of the petition, Time Warner Cable provided the additional information that the “greater Portland area” consists of the municipalities of Portland, South Portland, Scarborough, Westbrook, Gorham, Falmouth, Cumberland and Yarmouth, and that 9,100 customers in that area are subscribers to Road Runner.

III. DISCUSSION

The issue before the Commission is whether TWC, if it offers telephone service as described in its Request, is a public utility subject to the Commission's jurisdiction pursuant to Title 35-A.

TWC is providing a telecommunications service. 35-A M.R.S.A. § 8301 makes clear that cable television companies may be telephone utilities:

Cable television companies, to the extent they offer services like those of telephone utilities subject to regulation by the commission, shall be subject to the commission's jurisdiction over rates, charges and practices, as provided in this Title.

TWC is using equipment that constitutes a "telephone line" as defined in 35-A M.R.S.A. § 102 (20). A "telephone utility" is defined in 35-A M.R.S.A. § 102(19) as an entity "owning, controlling, operating or managing any telephone line for compensation within this state." Under our decisions and those of the Law Court, however, merely offering and providing telephone service over a "telephone line" does not by itself make an entity a public utility. To be considered a public utility, the entity must offer a service for "public use." *Dickenson v. Maine Public Service Company*, 223 A.2d 435, 438 (Me. 1968); *Gilman v. Somerset Farmers Cooperative Telephone Co.*, 129 Me. 243, 247; 151 A. 440 (1930). In *Small Point Water Co., Request for Determination of Public Utility Status*, Docket No. 88-183, Order (Jan. 3, 1989) at 4, we stated:

If these statutory definitions [defining "water works" and "water utility" in a manner parallel to the definitions of "telephone line" and "telephone utility"] were all that governed a determination of public utility status, then the SPWC would be a public utility subject to Commission jurisdiction. The Law Court and the Commission, in past decisions, however, have made it clear that before an entity will be regulated as a public utility it must, in addition to the statutory definitions, satisfy the so-called "public use" test. A utility must be devoted to a public use before it will be subject to regulation. *Gilman v. Somerset Farmers Co-operative Telephone Company*, 129 Me. 243, 151 A. 440 (1930); *Public Utilities Commission v. A.R. Wright Co.*, 36 P.U.R. NS 336 (Me. P.U.C. 1940).

In a number of cases, the Commission has applied a test for determining whether a utility system is devoted to the use of the "public in general" or merely particular individuals. See, e.g., *Kimball Lake Shores Association*, M #221, Issuance of Show Cause Order (Me. P.U.C. Jan. 31, 1980). *Gilman* is the leading early case on the public use test. In that case, the Court stated:

The test, then, as to whether telephone service is being furnished by a public utility, is whether the owner or operator furnishing the service has the right to transmit, and is ready to transmit conversations and messages, not necessarily for the benefit of the whole public or even a large part thereof, but to all parties similarly situated without partiality or unreasonable discrimination, in equality of right, to the extent that capacity may admit of use, for compensation.”

Gilman, 129 Me. at 247, 151 A. at 442.

In *New England Telephone Company, Request for Advisory Ruling*, Docket No. 84-208 (Me. PUC, June 20, 1985), the Commission restated the public use test:

The test of a public utility is whether or not such a person holds himself out expressly or impliedly as engaged in the business of supplying his product or service to the public as a class or to any limited portion of it, as contradistinguished as holding himself out as serving or ready to serve only particular individuals. The public or private character is not dependent upon the number of persons by whom used, but whether open to use and service of all members of the public to the extent of its capacity.

This statement of the public use test was most recently quoted and applied in *Central Maine Power Company, Re: Application to Invest Funds in Telecommunications Project and Approval of Related Affiliated Interest Transactions*, Order Regarding Utility Status, Docket No. 96-535 (Me.P.U.C. Dec. 2, 1992).

The Commission has developed a seven-factor test for resolving “public use” issues such as that presented in this request. The seven-factor test was most recently revisited in *Public Utilities Commission, Re: Request for Commission Investigation into Central Monhegan Power*, Order dated October 17, 1996, at 5-6:

The test includes seven factors. None of these alone is conclusive, but taken together they may be used for determining whether a utility system is devoted to use of the public. The seven factors are:

1. The size of the enterprise;
2. Whether the enterprise is operated for profit;
3. Whether the system is owned by the user(s);
4. Whether the terms of service are under the control of its user(s);
5. The manner in which the services are offered to prospective user(s);
6. Limitation of service to organization members or other readily identifiable individuals; and

7. Whether membership in the group (e.g., whether taking service) is mandatory.

Id. at 4-5.

TWC cannot claim support for its position from every one of these factors. Nevertheless, several do support its position. First, the enterprise is relatively small, at least compared to the size of the greater Portland area within which Time Warner Cable will provide the service: it is “strictly limited” to 1,000 customers. Second, Time Warner Cable does not presently anticipate that the pilot program will necessarily be profitable. Apparently, its primary intent is to ascertain market reaction. Most importantly, it is reasonably clear that TWC is not “holding out” to the general public, or a significant subset thereof, without restriction as to the availability of the service for that general public or segment. While Time Warner Cable will solicit customers from all of its 9,100 existing Road Runner customers, it is essentially offering its service on a first-come, first-served basis to only 1,000 of them.¹ Even the first 1,000 customers who request the service will not necessarily be able to receive it, if TWC decides that there are too many customers in any given area. We also view the experimental nature and the limited duration of the proposed pilot program as significant. The program is designed to test whether a relatively new high-speed technology may be used for telephone service, and the service will be offered expressly on a trial basis that will “end or be converted into a permanent offering by March 31, 2001.”² Assuming that Time Warner Cable adheres to its proposal, we find that the offering is not sufficiently general to constitute a holding-out or to the public to make it a public utility.³

We also note that 35-A M.R.S.A. § 7101 (2) states:

¹ TWC has stated that it will send its promotional material and customer contract to the Director of the Commission’s Consumer Assistance Division prior to implementing the proposed pilot program.

² We do not rely on the fact that subscribers to the telephone service must be Road Runner customers. In its reply comments, TWC suggests that subscribing to Road Runner is a “membership” requirement that satisfies the sixth and seventh factors of the “public use” test. TWC’s initial filing makes it clear that subscribing to cable-modem-based Road Runner service is a technical requirement. The sixth and seventh factors relate to membership in an organization, including, in some cases, membership in the entity such as a cooperative, that is providing the service itself.

³ In its comments, TAM “questions whether, if one of its members were to offer a new service on a pilot project basis, the Commission would find the project not to constitute utility service.” TAM also mentions the current required tariffing of promotional and discount rates for existing services. In this Ruling, we are considering the question whether the whole of TWC’s presently proposed telecommunications enterprise makes it a telephone utility. A different question is presented when an entity that is clearly established as a public utility decides to offer an additional service on a pilot or trial basis.

The Legislature further declares and finds that a modern state-of-the-art telecommunications network is essential for the economic health and vitality of the State and for improvement in the quality of life for all Maine citizens. Therefore, it is the goal of the State that all Maine's businesses and citizens should have affordable access to an integrated telecommunication infrastructure capable of providing voice, data and image-based services. The State shall consider policies that:

. . .

B. Employ methods of regulation that encourage the development and deployment of new technologies . . .

TWC is not using a new technology (cable modem service), but it is deploying a relatively new technology in a new manner. Our conclusion that the limited offering of this service does not make TWC a telephone utility at this time is consistent with the legislative mandate that regulation should encourage the development and deployment of new technologies.

Our Ruling that TWC will not be a public utility is based on its description of the proposed Pilot Program. Should Time Warner Cable deviate in any material way from its described proposal, a different legal question would be presented. While we do not purport in this Order to delineate all circumstances under which TWC may become a public utility, if TWC were to significantly expand its offer on a non-discriminatory basis to a large segment of the public, for a permanent or indefinite period, it is most likely that such an offering would make Time Warner Cable a public utility.

If Time Warner Cable decides at any time during the trial that it will be providing a public utility offering after March 31, 2001, it should file an application for a finding of public convenience and necessity as soon as possible prior to that date to allow a reasonable amount of time for processing the application.

Dated at Augusta, Maine, this 7th day of April, 2000.

BY ORDER OF THE COMMISSION

Dennis L. Keschl
Administrative Director

COMMISSIONERS VOTING FOR: Welch
 Nugent
 Diamond

NOTICE OF RIGHTS TO REVIEW OR APPEAL

5 M.R.S.A. § 9061 requires the Public Utilities Commission to give each party to an adjudicatory proceeding written notice of the party's rights to review or appeal of its decision made at the conclusion of the adjudicatory proceeding. The methods of review or appeal of PUC decisions at the conclusion of an adjudicatory proceeding are as follows:

1. Reconsideration of the Commission's Order may be requested under Section 1004 of the Commission's Rules of Practice and Procedure (65-407 C.M.R.110) within 20 days of the date of the Order by filing a petition with the Commission stating the grounds upon which reconsideration is sought.
2. Appeal of a final decision of the Commission may be taken to the Law Court by filing, within 30 days of the date of the Order, a Notice of Appeal with the Administrative Director of the Commission, pursuant to 35-A M.R.S.A. § 1320(1)-(4) and the Maine Rules of Civil Procedure, Rule 73, et seq.
3. Additional court review of constitutional issues or issues involving the justness or reasonableness of rates may be had by the filing of an appeal with the Law Court, pursuant to 35-A M.R.S.A. § 1320(5).

Note: The attachment of this Notice to a document does not indicate the Commission's view that the particular document may be subject to review or appeal. Similarly, the failure of the Commission to attach a copy of this Notice to a document does not indicate the Commission's view that the document is not subject to review or appeal.